1984

Tracy-Collins Trust Company v. Marian Story Goeltz : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

TRACY-COLLINS TRUST COMPANY
Plaintiff and Respondent,

vs.

MARIAN STORY GOELTZ,
Defendant and Appellant.

Case No. 8476

Appellant's Brief

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PRELIMINARY STATEMENT

This is an appeal from a judgment of the Third Judicial District Court foreclosing a mortgage on certain real property, and declaring the plaintiff Tracy-Collins Trust Company to be subrogated to rights under a previously existing mortgage and ordering the real property sold first to satisfy the claim under the subrogation and thereafter to satisfy the subsequent mortgage. The appeal is by Marian Story Goeltz only, who was a co-signer of the previously existing mortgage, but who had no

relation to the subsequent mortgage and whose name was forged thereon, and completely without her knowledge or consent.

Tracy-Collins Trust Company, a corporation filed suit against the appellant and Francis B. Goeltz to foreclose a mortgage dated May 10, 1948, given to secure a promissory note of the same date, both documents purportedly signed by Francis B. Goeltz and Marian Story Goeltz, who at that time were husband and wife.

Defendant Francis B. Goeltz answered admitting the execution by him of the note and mortgage. Appellant answered, denying that she had executed such note and mortgage, denying that she received the money therefrom, and setting up as defenses that the note and mortgage purporting to pledge their joint interests in the real property, was void, that her signature thereon was a forgery, that she had not authorized Francis B. Goeltz or anyone else to sign her name; that at said time Francis B. Goeltz had no interest in the property; that Tracy-Collins Corporation had been negligent in handling the note and mortgage transaction, and that it had knowledge, or notice of facts divesting it of any claim as a bona fide lender.

Thereafter, Tracy-Collins Corp. filed its Supplementary Complaint setting up a claim of right to subrogation under an earlier mortgage, asserting that in 1936 Francis B. Goeltz and Marian Story Goeltz had executed a mortgage which subsequently was owned by Pacific Mutual Life Insurance Co., and which was paid off with a part of the proceeds of the 1948 mortgage monies.

Appellant Marian Story Goeltz answered the Supplemental Complaint controverting Tracy-Collins Corporation's right to subrogation and re-asserting defenses against the 1948 mortgage.

STATEMENT OF FACTS

Appellant and Francis B. Goeltz were husband and wife in 1936, at which time certain real property was purchased, and title thereto taken in their joint names. A mortgage loan was obtained on these premises October 27, 1936 (Ex. 22-P and 23-P). Appellant sought to introduce evidence in the trial court establishing the fact that she owned substantially the entire interest in the real property, but upon refusal of the court to allow this testimony, made an offer of proof to that effect. (R. 153, 154, 155).

Subsequently to 1936, Marian Story Goeltz and Francis B. Goeltz were divorced, and the real property in question was awarded to her in that proceedings. However, prior to the divorce, Francis B. Goeltz had, in 1948 mortgaged the property to Tracy-Collins Corp. under the following circumstances.

Goeltz had applied for a mortgage loan, which had apparently been approved, the papers were prepared, and Mr. Henager notified Mr. Goeltz to this effect. (R. 104, 114). Thereafter, Goeltz came into the bank and asked permission to take the papers out for Mrs. Goeltz to sign. (R. 114, R. 115). He was informed that this was irregular, that Mr. Henager had no authority to allow this, and the matter was referred to Mr.

Benedict, a bank officer. Mr. Benedict allowed Mr. Goeltz to take the papers out for signature on the representation by Mr. Goeltz that Mrs. Goeltz was ill and could not come in to sign them. (R. 168, 172, 173).

The circumstances under which the 1948 mortgage was made are very material to the issues raised on appeal, and bear emphasis at this point. Henager testified that he told Goeltz that to allow the papers out was contrary to their banking practice and rules, (R. 168, 114) and characterized the allowance of this in this case as "very unusual" (R. 104,5), and that they had practically no cases like it. Mr. Benedict, a bank officer, who authorized the loan papers to be taken out to be signed, testified that it was unusual to allow mortgage loan papers out (R. 168) that Mr. Goeltz made the request stating that Mrs. Goeltz was not feeling well, and that the very reason for not allowing mortgage loan papers out was to prevent just such occurance as here occurred (R. 173, 174), and that allowing papers out was contrary to their banking practice (R. 173.) Mr. Benedict also testified that he knew Mrs. Goeltz very well, and that he could easily have contacted her and thus avoided this whole thing. (R. 173.)

The 1948 mortgage and mortgage note were signed by Francis B. Goeltz, and purportedly were signed by Mrs. Goeltz, and a check issued by Tracy-Collins Corp. to Francis Boydell Goeltz in the sum of $3,851.60. The entire mortgage was in the sum of $7,100, but the balance of $3,224.41 was remitted to Pacific Mutual Life Insurance Company to pay off the existing real estate mortgage as of that time. Tracy-Collins Corp. had no

interest in the existing mortgage other than as agent to receive payments, and admittedly had no recourse liability or otherwise on that mortgage.

Marian Story Goeltz first discovered the existence of the new mortgage loan in 1951, and went immediately to the bank concerning the same, and at that time told Mr. Benedict that she had not signed the same, and exhibited documents to him bearing her signature for comparison, and obtained his acknowledgement that the signature did not appear to be the same. (R. 150).

An expert testifying at the trial confirmed Mr. Benedict's opinion that the signatures were not the same, (R. 128-133) and indicated that a superficial examination convinced him of this fact.

The documentary proof asserted in support of the 1948 mortgage and note, including those documents reveal clearly that the note and mortgage purport to be a joint note and mortgage. (Ex. 9-P, 10-P). A supplemental agreement accompanying these documents gives further support to this fact. (Ex. 11-P). Nowhere either in the documentary proof or in the oral evidence is there any suggestion that a separation of the interests in the property was ever contemplated, or that anything less than the entire property was considered as having been pledged, or that this was anything other than a joint loan. Nonetheless, the Findings of Fact, particularly Nos. 1, 2, 3, 4, and 5, purposely ignore this fact and lend credence to the conclusions No. 3, 4, and 7(b) and the judgment following therefrom.

STATEMENT OF POINTS

I. The 1948 Mortgage was a void mortgage, and Plaintiff cannot gain any rights thereunder.

II. The plaintiff was guilty of culpable negligence and not entitled to any recovery under the 1948 mortgage.

III. The claim of the plaintiff under the 1948 mortgage is subject to the true rights in ownership of said property as they actually existed in Marian Story Goeltz.

IV. The trial court erred in refusing to allow the appellant to establish that the bank was put on notice in the 1948 mortgage loan application by the condition of the defendant Francis B. Goeltz physically and mentally at that time.

V. The bank had possession of information from which it could have determined that the purported signatures of Marian Story Goeltz on the 1948 note and mortgage and supplemental agreement were forgeries, and was bound by what it should have discovered in this respect.

VI. The plaintiff is not entitled to be subrogated to the original mortgage.

VII. The trial court erred in its judgment with respect to the method and order of sale of the property subject to foreclosure.

Point I.

The 1948 mortgage was a void mortgage, and Plaintiff cannot gain any rights thereunder.

As indicated in the statement of facts heretofore, there is absolutely no doubt but that Mrs. Goeltz signature was forged on the note and mortgage, and on the supplemental agreement.

The entire transaction purported to be the mortgage of jointly owned property by the joint owners thereof, and to be a pledge of the entire interest of both parties therein, in exchange for a loan to them both. (Ex. 9P, 10P and 11P). No suggestion exists anywhere in the transaction that less than this was intended, or bargained for, and in fact the entire record is to the contrary. In fact, the discussion acknowledged by Henager and Benedict (R. 104-114, 168-173) indicates clearly that the loan was conditional upon Mrs. Goeltz signature being obtained, otherwise no necessity for any of the subsequent by-play existed.

In this respect, the case falls within the doctrine of Stockyards National Bank, etc. v. Bragg, 67 Utah 60, 245 P. ~~9~~966, wherein it was held that a mortgage conditioned upon certain minors also giving a valid mortgage was invalid en toto when the mortgage of the minor's interest failed of validity.

Certainly in the instant case, the Tracy-Collins Corp. did not intend to grant a mortgage on Goeltz interest in the property alone, and in fact, had such a suggestion been made to them, or had they been bargaining for such a transaction, they undoubtedly would have viewed the entire transaction more

closely than they did. Finding No. 24 is to the effect that they thought they were bargaining for the whole security, and all of the interest in the property.

To give them the benefit of a severance of the joint interest, and findings that Geoltz pledged his interest in that property, under the circumstances here involved, is to allow them to now assert in the findings something absolutely foreign to their own handling of the transaction and something absolutely contrary to fact, and findings No. 3, 4, 5 and 20 in this respect are contrary to the evidence and cannot be sustained, nor can the conclusions stemming therefrom, nor the judgment.

An Annotation at 151 ALR 414 (also noting earlier annotations) collects numerous cases dealing with the situation where a mortgage is void because of the forgery of a signature of the wife as here involved, and dealing specifically with the question of right of subrogation in such circumstances.

In the case of Zinkeison v. Lewis, 63 Kan. 590, 66 Pac. 644, a similar factual picture to the one here involved was presented. In that case, a new mortgage had been obtained by the husband and to pay off a prior mortgage. The wife did not sign the mortgage, and the husband admitted having signed his wife's name without authority. The evidence indicated that the wife knew of the forgery shortly thereafter, but said nothing about it, contrary to the facts in the present case. The court ruled the second mortgage invalid, but said that the lending agency was subrogated to the rights of the first mortgage which was satisfied with the monies from the second mortgage loan.

In the case Serial Building Loan & Savings Inst. v. Ehrhardt 95 N. J. Eq. 607, 124 A. 56, the court held that where the husband had forged the wife's signature to a mortgage that was partly used to pay off an earlier mortgage held by the *same* people, that the second mortgage was void and invalid because of the forgery, but that the plaintiff was entitled to be subrogated to the rights as they existed under the discharged first mortgage.

To the same effect see Davies v. Pugh 81 Ark. 253, 99 S.W. 78, wherein the wife's signature was forged by the husband and the court held the mortgage void in its entirety, but held that the plaintiff was entitled to subrogation to an earlier valid mortgage.

Also, in the case of Carey v. Hart, 208 Ala. 316, 94 So. 298, the wife's signature was forged and the court held the mortgage invalid.

In the case of Home Owners Loan Corp. v. Papara, 241 Wis. 112, 3 N. W. 2d 730, the names of certain co-tenants were forged to a note and mortgage purporting to mortgage the entire interest in the property, and the proceeds used to pay off an existing mortgage. The court held the mortgage to be invalid because of the forgery, but allowed the plaintiff to be subrogated to the rights existing under a prior valid mortgage.

Many, many other cases might be cited, including the following, holding that the new mortgage is invalid under circumstances where a forgery of one of the purported signatures exists, and holding that the remedy if one exists to the plaintiff

as to the real property involved, is in subrogation to a prior existing mortgage. Kusky v. Staley, 138 Kan. 869, 28 P. 2d 728; Kaminskas v. Cepanskis, 369 Ill. 566, 17 N. E. 2d 558; Hall v. Marshall, 139 Mich 123, 102 N. W. 658; and Krost v. Kleg (Mo.) 46 S. W. 2d 866.

In fact, the existence of the doctrine of subrogation in the law of mortgages is predicated to a considerable extent upon the theory that because of just such circumstances as a forgery, the interest bargained to be pledged has failed, and the mortgage void, and hence a remedy of subrogation made necessary in a proper case.

Appellant re-asserts that the 1948 mortgage in the present instance failed completed and was void by reason of the fact that it purported to be a pledge of the entire property, conditioned upon the signatures of both parties, and that hence no rights can exist in favor of the plaintiff against the property itself arising out of the mortgage, that the rights of the bank, if any, lie in subrogation, and that in this instance as will hereinafter be made evident, no right to subrogation existed.

Point II

The plaintiff was guilty of culpable negligence and not entitled to any recovery under the 1948 mortgage.

Here appellant relies upon the testimony of Mr. Henager and Mr. Benedict as indicated in the statement of facts to the effect that it was a very unusual thing to allow a mortgage and

mortgage note out of the office to be signed, that it was contrary to their banking practice and contrary to instructions, and that the rule and banking practice was designed to prevent the happening of just such an occurrance as this.

It seems highly singular that a bank can violate its own rules, set up by reason of experience, as being necessary to prevent the happening of such things as this, and then to allow them to hurt a completely innocent party, when by violation of those practices they have allowed the happening of this unfortunate transaction.

Certainly good practice would dictate that if a violation is to occur, then some other safeguard should be inserted. In this instance the one which could and should have occurred is obvious from the testimony of Mr. Benedict who admitted somewhat ruefully that he knew Mrs. Goeltz well, and could easily have telephoned her and prevented the whole damage from occurring.

In view of the fact that holding to their rule would have brought them knowledge of the true fact with reference to the ownership of the property (the subject of an offer of proof), since Mrs. Goeltz had she been brought to the bank by Mr. Goeltz would certainly have indicated the true ownership of the property to them, or if she had in any way been contacted about the proposed loan when a violation of bank rules was being authorized, she would have advised them of the true ownership of the real property, it appears completely justifiable from her point of view that the bank be made to suffer for their own

banking practice violation, rather than her, and that the 1948 mortgage be ruled to be completely subject to her true ownership interest in the property, as will more particularly appear at a subsequent point herein.

Point III

The claim of the plaintiff under the 1948 mortgage is subject to the true rights in ownership of said property as they actually existed in Marian Story Goeltz.

It is true, that the property here involved was held in joint tenancy for record purposes at the time the 1948 mortgage was entered into by Tracy-Collins Corp. and Francis B. Goeltz, and purportedly by appellant, and appellant is not unmindful of the cases holding that as to third persons the record is conclusive.

However, as to parties who have knowledge, or notice of facts putting them on a duty of inquiry, certainly the true facts are admissable as a defense to the foreclosure against the property involved where the claim is ultimately made, as here, that Mr. Goeltz pledged his interest in the real property. It becomes very material then to determine what that interest, was, if any.

Appellant made an offer of proof as to what that interest was, after the trial court had refused to allow appellant to testify concerning that interest.

It is submitted that the trial court erred in refusing to allow the appellant to establish the interest of the appellant involved

in the foreclosure and the interest of Francis B. Goeltz in that property.

It is further asserted, that in the circumstances here involved the appellant had the right to submit evidence that the property was her sole and separate estate, and paid for her out of her sole and separate property. 41 C.J.S. Sec. 251, p. 735; Wallace v. Riley, 23 Cal. App. 2d 669, 74 P. 2d 800; Long v. Duprey, 52 N.Y. 2d 93; Moskowitz v. Marrow 251 N.Y. 380, 167 N.E. 506.

Point IV

The trial court erred in refusing to allow the appellant to establish that the bank was put on notice in the 1948 mortgage loan application by the condition of the defendant Francis B. Goeltz physically and mentally at that time.

In this respect appellant relies upon the offer of proof made at the trial wherein counsel offered to prove (R. 154, 155, 158, 159) that Mr. Benedict a good friend of Goeltz knew of the fact that Goeltz was drinking heavily and not paying attention to business, that he was using all of his funds for drinking and allied purposes, that he was under the influence of liquor practically continually during the period when this 1948 mortgage was entered into, and that the bank through their agent knew of these facts, and that it consequently was an additional fact which should have put them on guard.

The principle is clear, that "whatever is notice enough to

excite attention and put the party on his guard, and calling for inquiry is notice of everything to which such inquiry might have led." Meagher v. Dean (Utah) 91 P. 2d 454; O'Reilly v. McLean 84 Utah 551, 37 P. 2d 770.

Taken alone, it may be that the facts as outlined in the offer of proof with respect to drunken condition of Goeltz would not be enough to tip the scales in favor of appellant's point of view, although we earnestly believe that it would be sufficient However, this condition, when added to the "very unusual" occurrance of asking permission to take a mortgage note and mortgage out to be signed by one of the parties, certainly would appear to be sufficient to excite the person of ordinary observation powers to the extent that an inquiry would and should be made. The inquiry would have revealed that Goeltz had no right to mortgage, that Mrs. Goeltz was the owner of the property, and that any purported signature of hers would be a forgery.

Point V

The bank had possession of information from which it could have determined that the purported signatures of Marian Story Goeltz on the 1948 note and mortgage and supplemental agreement were forgeries, and was bound by what it should have discovered in this respect.

Counsel for appellant made demand upon plaintiff for the production of the original Mortgagors' statement in relation to the 1936 mortgage. This was produced by the plaintiff from its records, (R. 96, 118, 122) at the time of the trial. (Ex. 25-D R.)

This document bears the true signature of Marian Story Goeltz. Any examination whatsoever of the signature on that document and comparison of it with the poor attempt made in the 1948 note, mortgage and supplemental agreement to simulate her signature, would have at once indicated to the bank that a forgery was being attempted upon them.

In the face of the banking practice violated and the purpose of that practice to prevent such things, it seems inconceivable that the bank with a true signature in its possession and wherein the transaction in which document with the true signature on was being involved, would not have checked the signature at least perfunctorily as a cautionary measure. Any examination whatsoever, no matter how perfunctory would have at once revealed the forgery.

Appellant asserts that certainly the duty of the bank under the circumstances here involved extended to an examination of its own files and documents concerning this property, and that the bank should be bound by the knowledge it could have obtained from its own file. In this respect, the bank certainly had as much information available to it as was available to the bank in the case Fidelity Trust & Savings Co. v. Williams (Ill.) 1 N.E. 2d 739, where the husband got property into his wife's name by a series of transactions and then conveyed over to a third party and a mortgage obtained thereon with knowledge to the bank that the transfer to the third party was merely an accommodation. The court said:

> "We know of no law to the effect that because a woman holds title to property her husband may make

application for a loan and receive the benefit therefrom without notice to her of his intention to do so. This also applies to the bank, as it had knowledge that Sadie Schiavoni had an interest in this property and that title was conveyed as it admits to Williams as a dummy, and it should have made an investigation to determine what right Sadie Schiavoni had in and to the property.

"From the record it is apparent that a fraud was perpetrated by Michael Schiavoni but it is sufficient to say that this fraud would have been discovered if an investigation had been made by the Bank and they had learned the right she claimed in the property in question."

Point VI

The plaintiff is not entitled to be subrogated to the original mortgage.

As heretofore pointed out a Point I, the remedy of the plaintiff where a mortgage is void by reason of forgery, is that of subrogation. However, it is also necessary that facts justifying subrogation be present before that doctrine can be applied to give the plaintiff relief. In the present instance those facts do not exist.

This court has, in the case of Martin v. Hickenlooper, (Utah) 59 P. 2d 1139, set out the requirements for subrogation in Utah. This court in that case went into the doctrine of subrogation very thoroughly differentiating between "legal subrogation" and "conventional subrogation":

"When a lender in no way related to the property and not required to protect any interest advances money

> to pay off the lien 'legal subrogation' does not exist, and at most 'conventional subrogation' exists. In order to constitute 'conventional subrogation' there must be an agreement, express or implied, that the lender whose money pays off a lien will have some status as to the lien his money releases to the extent of the debt secured by that lien."

In the present case, the bank admittedly had no interest to protect. They had no interest whatsoever in the prior existing mortgage which was owned by Pacific Mutual Life Insurance Company. Hence, no "legal subrogation" could exist.

Did "conventional subrogation" exist in this instance then? Did a state of facts exist whereby an agreement, express or implied can be made out that the lender be subrogated to a status with reference to the lien which his money pays off? The plaintiff introduced absolutely no evidence of any express agreement. It is apparent from the record that the plaintiff was relying on the new mortgage only, and even in its initial pleading the plaintiff asserted reliance on the new mortgage only.

On the other hand, very cogent reasons exist why no "conventional subrogation" can arise based upon an implied agreement of the parties to subrogate the plaintiff to the mortgage the money was partially used to pay off.

First, an illegal act intervenes between her and any implied agreement to allow the bank to be subrogated, that is, a forgery of her signature to the subsequent documents out of which the subrogation must arise. To find that she impliedly consented to subrogation under such circumstances would be to find that she consented in the face of the fact that she had no knowledge

whatsoever of the signing of the new mortgage. Certainly the law of subrogation in Utah could not go so far as to find that the appellant impliedly consented to an act which she did not know and has fought desperately against since she became aware of it. Certainly it cannot be said that from the circumstances here it can be "implied that it was the intention of the parties that the person making the advance was to have security of equal dignity and position to that discharged," Martin v. Hickenlooper supra., in the face of the fact that appellant was not a party to the new mortgage except by virtue of forgeries. Yet, in the face of the Martin v. Hickenlooper case and the facts as they concededly exist (Finding No. 26, the court found that Tracy-Collins Corp. was entitled to be subrogated and the original mortgage foreclosed as against the interests of both Francis B. Goeltz and Marian Story Goeltz.

Second, the bank was guilty of culpable negligence in this new mortgage transaction, and hence not entitled to rely upon the doctrine of subrogation.

The case of Martin v. Hickenlooper, supra, holds, and cites numerous other authorities so holding, to the effect that one who is otherwise entitled to be subrogated, loses that right if culpably negligent. See also: McCollam v. Lark, 187 Ga. 292, 200 S.E. 276; Wilton v. Gibson 38 S.E. 379.

Without repeating the evidence as heretofore set forth, appellant respectfully refers the court to the Statement of Facts, Point II, Point III, Point IV and Point V herein, wherein those facts are alluded to, together with the information which would have been discoverable had inquiry been made.

It is earnestly submitted that the bank (1) had information in its own files which would have indicated to them the existence of the forgery, and were negligent in failing to use it; (2) was negligent in allowing the documents out to be signed in violation of its own rules without taking additional precaution to supplant that rule, particularly here where the party to be contacted was well known to the bank official authorizing the rule infraction; (3) had information through its agent Benedict of the condition of Goeltz, physical and mental, sufficient to put the bank on a duty of inquiry in view of the unusual request made of it; (4) acted negligently in making the check payable to Goeltz alone on a joint loan thus enabling him to complete the mortgage transaction without ever giving notice to Mrs. Goeltz thereof; that these facts combined certainly are sufficient to establish the existence of culpable negligence in the instance case sufficient to defeat any subrogation whatsoever.

To allow the bank to be subrogated to the original mortgage and foreclose it under these circumstances would be the equivalent of saying that no matter how negligent or irresponsible a bank is or may be, it will be protected, even against a totally innocent party who is the one ultimately to be injured by the carelessness of the bank.

It is earnestly submitted that plaintiff has shown absolutely no right to subrogation in this case, and that the trial court erred in finding that it was entitled to subrogation and in the conclusions and judgment which follows therefrom.

Appellant also asserts that Finding No. 28 finds no support in the evidence. Appellant does not controvert the fact that the

note and mortgage of 1936 was valid and binding prior to the 1948 note and mortgage, but certainly has not and does not admit the present validity or existence of either the 1936 note or mortgage which this finding apparently determines. In this respect also, the conclusions and judgment are not sustainable.

Point VII

The trial court erred in its judgment with respect to the method and order of sale of the property subject to foreclosure.

The trial court by its judgment attempts to set out the order of sale, the method of sale, and instruct the sheriff in the method whereby the sale is to be conducted. In doing so, the trial court erred in several respects, prejudicial to the appellant.

At page 3 of the Judgment, the court orders that the Sheriff sell at public auction the interests of Marian Story Goeltz and Francis Boydell Goeltz as owned by them on October 27, 1936. Then follows instructions to the Sheriff to the effect that the sale of this interest in the property is to be sold first in time. (par. 1, page 3) (R. 197), to satisfy the judgment against both, and in par. 5, page 4, orders any surplus paid into court to abide the order of the court.

(A)

The first error in this procedure and instructions is that it appears to recognize some right in Francis Boydell Goeltz to

the monies involved in the sale of his purported interest. Both plaintiff and defendant introduced evidence establishing that Francis B. Goetlz had conveyed his interest in the property to Marian Story Goeltz (Ex. 7 P and 8 P) yet the judgment seems to give credence to the idea that some redemption right or otherwise might exist in Francs B. Goeltz. This inference seems to be heightened by the 2nd unnumbered paragraph of the judgment at page 5 thereof (R. 199) wherein it is stated "that the aforesaid defendants and each of them, be forever barred and foreclosed of and from all equity of redemption and claim of, and in and to said mortgaged premises and every part and parcel thereof from and after the delivery of said Sheriff's deed.

Regardless of whether this is a sale of the interests of these parties as of 1936, or not, the only party with redemption rights as between Francis B. Goeltz and Marian Story Goeltz is the party who holds the fee title as of the present time as between these two parties, and the judgment of the court purports, without a shred of evidence to sustain it, and in fact, in the face of uncontroverted evidence to the contrary, to allow Francis B. Goeltz redemption rights in the property. This is clearly erroneous, yet potentially sets the stage for another lawsuit to determine the lack of redemption rights in Francis B. Goeltz.

(B)

It also ties up in court money from the sale which clearly belongs to Marian Story Goeltz under the facts of the case with respect to property ownership, and in this respect also the judgment is erroneous.

(C)

Second, the judgment is erroneous in that it purports at page 6, first unnumbered paragraph (R. 200) to authorize the granting of a personal judgment against Marian Story Goeltz for a deficiency if one should occur.

This illustrates the error the trial court made when it ruled that plaintiff was subrogated to rights under the 1936 mortgage. It gives the plaintiff a personal right against the appellant based upon subrogation, where the 1948 mortgage was invalid and void, rather than just against the property. This would appear to give the plaintiff a better remedy than it could have against Francis B. Goeltz on the 1948 mortgage, since it has the effect of rendering Mrs. Goeltz personally liable for monies he received because of his defalcation, and assessing more against her personally than can be recovered against the property. This does not subrogate the plaintiff merely to the prior lien, but gives it the right to a personal judgment as well.

It is submitted that the trial court erred in granting the plaintiff the right to a personal judgment against the appellant for any deficiency.

(D)

Third, the trial court erred in determining that the joint interests of the parties should be sold first to satisfy the subrogated claim against their joint interests, and thereafter ordering that the property be sold a second time to dispose of the interest of Francis Boydell Goeltz being an undivided 1/2 interest in

the property owned by him on May 10, 1948. (Page 6 of judgment (R. 200).

Francis B. Goeltz, if he had any interest in the property at all, had only one interest in the property. He did not have a joint interest with Marian Story Goeltz and also an undivided one-half interest in the property which can be sold separately, and a second time. If Francis B. Goeltz interest is the property, assuming the existence of an interest, is sold at all, it must pass entirely by and under the sale of the joint interest of the parties as of 1936. If a purchaser buys the property it must necessarily be that the purchaser buys the entire interest in the property, that is, the joint interest of the parties. By inserting another judgment foreclosing the Francis B. Goeltz interest in the property at a subsequent date, the court has succeeded in making it highly questionable that a sale under the first sale will produce any substantial revenue, and has further clouded the property ownership to the extent that it will require additional litigation should Marian Story Goeltz exercise her right of redemption in the first instance, to determine whether the purchaser at the second sale has any rights whatsoever in the property.

Marian Story Goeltz has the right to exercise her own and individual redemption rights in and to this property upon the sale of the joint interest therein. Yet the court by making the judgment as it has, has for all purposes rendered it impossible for her to exercise those rights unimpaired by serious legal questions.

At page 8 of the judgment unnumbered paragraph 2, (R.

202) the court repeats the error pointed out in subparagraph (A) above with respect to redemption rights.

It is earnestly submitted that the Judgment of the court is so erroneous and so lacking in basic substantiation as to be completely improper, that the judgment impairs severely rights of the appellant in the respects pointed out above, and thrusts her into prolong litigation with respect to protection of her interests in this property, and without any justification whatsoever in so doing, and that basic fairness and justice dictates that the judgment should be reversed.

CONCLUSION

It is earnestly submitted and urged that the facts and circumstances involved in the case here at bar are such that the Tracy-Collins Corporation should not be allowed to step in and deprive the appellant of her home under the foreclosure proceedings, and that the trial court erred in the exercise of equitable powers in so decreeing. Further, that the Bank by reason of its own actions made possible the harm which was done, and should not be allowed to make an innocent party suffer.

It is further respectfully urged that the trial court decided the question of subrogation contrary to existing Utah law.

Appellant earnestly presses for a reversal of the judgment of the trial court on the basis of the errors committed by that court.

Respectfully submitted
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